ADMINISTRATIVE APPEAL OF

CLAIR COOMES

v.

AREA DIRECTOR, ABERDEEN ET AL.

IBIA 74-18-A Decided April 22, 1974

Appeal from an administrative decision of the Area Director, Aberdeen, affirming a decision of the Superintendent, Pine Ridge Agency.

Reversed and remanded.

Indian Lands: Allotments: Generally--Grazing Permits and Licenses: Generally

> Improvements placed on permitted land shall be considered affixed thereto unless excepted therefrom under the terms of the permit.

APPEARANCES: E. Y. Berry, Esq., for Clair Coomes, appellant.

OPINION BY ADMINISTRATIVE JUDGE WILSON

The above-entitled matter comes before the Board on an appeal by Clair Coomes, hereinafter referred to as appellant, from a decision issued by the Area Director, Bureau of Indian Affairs, Aberdeen, South Dakota, under date of July 13, 1973. The Director affirmed a decision of the Superintendent, Pine Ridge Agency, Pine Ridge, South Dakota, issued on September 20, 1972. The Superintendent's decision, among other things, determined that (1) certain improvements situated on permitted lands, Grazing Unit 27, belonged to the landowner and (2) ordered appellant to either negotiate a lease at a fair rental based upon the premises as improved or vacate the premises.

It is from the foregoing decision that this appeal has been taken. In support thereof the appellant, among other things, alleges:

(1) that the improvements in question belong to the appellant, and

(2) that such improvements should not be included and considered in arriving at a fair rental value for the premises in question.

The record discloses that the land involved herein, comprising the SE 1/4, sec. 25, T. 38 N., R. 45 W., 6th P.M., South Dakota, is a part of the original allotment of Fred Running Horse, OS-921. Upon the death of the original allottee on September 25, 1928, the land passed by will to Peter Running Horse, Sr., OS-6015. Peter Running Horse, Sr., on July 20, 1933, conveyed the land in trust to his wife and present owner, Jessie Running Horse, OS-1164.

The record further discloses the premises have been under permit to the appellant for grazing purposes since the year 1935. Up until the year 1956 there appears to have been no change as to how improvements were to be reserved in the permit. Prior thereto the approved permit included a stamped statement regarding improvements to the following effect:

> Permission is hereby given to remove, within 30 days from expiration of permit, all improvements which he may place upon the land.

There appears to have been no question on the part of all parties concerned that any and all improvements placed on the land under such permits were considered appellant's personal property.

However, beginning with the year 1956 the consent of the land owner was required by the Department with regard to placing and removing improvements from permitted lands. The record indicates

as late as May 10, 1967, the Pine Ridge Agency was cognizant of the fact that the appellant's use of allotment 921 as a ranch headquarters site under his permit was authorized in writing by the landowner and that the improvements situated thereon belonged to appellant.

In a letter of May 10, 1967, to appellant, the agency advised in pertinent part:

> * * * If you do not wish to arrange such a lease you should commence making arrangements for the removal of the improvements presently located on the land. * * * (Emphasis supplied.)

The agency further advised:

> * * * The fact you have utilized this land for headquarters for many years at a very nominal rate should certaily [sic] be considered. (Emphasis supplied.)

In an appraisal report for sale purposes dated June 16, 1972, and approved by the Department on September 1, 1972, involving the tract in question, the following entry appears on page 2 thereof:

> Pine Ridge Agency records indicate the present permittee has a permit for improvements; removable range improvements include house, sheds, fencing and windmill. A check of Shannon County tax records which are housed in Fall River County Court House in Hot Springs, South Dakota indicate the present permittee has listed for several years for assessment and taxation house and buildings on leased land; contribution value of stock, dam and well is included in overall land value. (Emphasis supplied.)

The foregoing, coupled with the landowner's letter of October 2, 1973, to the effect she gave appellant the right to place and remove any and all improvements that he thought were necessary in the operation of the land, clearly dispels any question as to whom the improvements in question belonged. We fail to see how the Superintendent under the circumstances could possibly conclude as a matter of law that the improvements belonged to the landowner. Apparently, such conclusion was based largely on the fact that a document identified "Removable Range Improvements," submitted by the appellant in connection with his present permit, although signed by the landowner, was not dated or approved by the Superintendent. No explanation appears in the record why such document was never approved and it is only reasonable to conclude that it was an oversight on the part of the Agency to act thereon. In any event, the appellant had no control over the matter once he had obtained the signature of the owner and submitted it to the Agency for appropriate action.

We note that the Area Director on page 2 of his letter of July 13, 1973, advised the appellant that "the placing of a ranch headquarters does not appear to fall within the scope of the law or regulations." We disagree with the Superintendent's conclusion. Ever since 1935 when grazing units on Indian trust lands were first authorized, regulations have provided for the placing and removal of improvements on such units.

Current regulations, 25 CFR 151.17, under which the appellant's present permit was approved, in pertinent part reads:

> Improvements placed on the permitted land shall be considered affixed to the land unless specifically excepted therefrom under the permit terms. Written permission to construct and remove improvements must be secured from the Superintendent. The permit will specify the maximum time allowed for removal of improvements so excepted.

We can perceive of no plausible reasons why improvements, such as buildings, cannot be included thereunder so long as they are needed and are necessary for the full and proper utilization of grazing privileges under a permit. Buildings, in the case at bar, appear quite necessary and essential for the full utilization of the grazing privileges and for the successful operation of appellant's livestock enterprise. To hold otherwise would be unrealistic, to say the least.

The Board is in agreement with the Superintendent to the extent that the acreage upon which the ranch headquarters is situated should bring a higher return than the usual grazing fees. This only follows in view of the fact that the use of the acreage for ranch headquarters purposes constitutes a higher and better use than grazing. The record indicates the appellant also is in agreement therewith. However, the improvements comprising the ranch headquarters should not be taken into consideration in arriving at a fair rental value for the acreage and we are in agreement with the appellant in that respect.

There is no indication in the record, as presently constituted, that the acreage involved herein was ever removed from the appellant's range unit, No. 27, as was at one time contemplated due to a possible sale by the owner. Accordingly, since the tract in question is still under appellant's grazing unit until October 31, 1975, we see no reason why the current permit cannot be modified to (1) reflect the fact that the improvements in issue herein [headquarters buildings, etc.] are the personal property of the appellant and removable within a reasonable time after the expiration of the permit, and (2) to reflect the fair rental unless the current rental is considered fair, based upon its highest and best use which in this case appears to be for the headquarters site and the remainder for grazing. The foregoing procedure would eliminate the necessity of the parties entering into a lease for the headquarters site only as suggested by the Agency.

In view of the reasons and conclusions set forth above the Board finds:

(1) That the improvements in issue, namely, the buildings, corrals, etc., situated on the SE 1/4 sec. 25, T. 38 N., R. 45 W., are the property of the appellant, and

(2) that rentals for said tract should be based upon its highest and best use, i.e., ranch headquarters site and grazing, and

(3) that the current grazing permit should be modified to reflect above items (1) and (2).

In view of the reasons hereinabove set forth, the decision of the Area Director, dated July 13, 1973, should be reversed and the matter remanded for appropriate action consistent with the views set forth herein.

NOW, THEREFORE, by virtue of the special delegation of authority to the Board of Indian Appeals, by the Assistant Secretary of the Interior, dated September 13, 1973, the decision of the Area Director, Aberdeen, South Dakota, is hereby REVERSED and the matter is hereby REMANDED to the Area Director for appropriate action consistent with the views and findings set forth herein.

This decision is final for the Department.

_____
Alexander H. Wilson
Administrative Judge

I concur:

_____
Mitchell J. Sabagh
Administrative Judge